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COPING AND PLANNING FOR UNCERTAINTIES IN THE DEVELOPMENT OF EXCEPTIONS TO THE EMPLOYMENT-AT-WILL DOCTRINE

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I. INTRODUCTION

Very few areas of the law have developed and changed as rapidly as employment relations. In particular, the once seemingly impregnable employment-at-will doctrine has begun to show cracks in its foundation. Numerous exceptions have developed to this doctrine allowing a discharged employee to bring a civil action against his employer for damages resulting from termination.

The time is long gone when an employer can discharge an employee on the slightest whim. What makes an employer's decision to discharge an employee very complex are the inconsistencies and variations courts use in developing exceptions to the employment-at-will doctrine. Different courts in different jurisdictions do not apply uniform standards in developing exceptions to the doctrine.

As a result of the rapid changes in this area and inconsistencies in the law, an employer must carefully evaluate his current personnel policies as well as the implementation of new policies affecting the contracting

and tenure of employees. It is imperative that employers begin planning for the uncertainties that have and will continue to develop.

This Article will focus on how an employer can cope and plan for uncertainties in discharging an employee. After giving a general overview of the employment-at-will doctrine and the development of legal exceptions to its application, the discussion will center on four areas in which employers must address a changing relationship with its employees. These four areas include the planning of employment handbooks, job evaluations, developing personnel policies and planning for wrongful discharge litigation. The Article will conclude with some observations and thoughts on the benefits of coping with and planning for uncertainties in this area of employer-employee relations.

II. THE EMPLOYMENT-AT-WILL DOCTRINE

For over a century an employer could discharge an employee for any or no reason. Likewise, an employee could quit a job for any or no reason. But in recent years, courts have begun to carve out numerous exceptions to this once basic principle of employment law. Employers must now be aware of at least six exceptions which courts may apply in skirting the employment-at-will doctrine.¹

The most common exception adopted by many jurisdictions involve the violation of a public policy recognized by the state as deserving protection.² Violations of public policy range from discharging an employee for filing a workers compensation claim,³ to firing an employee for missing work because of jury duty.⁴

A second exception involves the breach of contractual promises made by an employer to an employee either at the beginning or during the course of the employment relationship.⁵ Frequently, problems arise when the employer promises that discharge will only result if good cause is shown.⁶ The same problem may arise if employee handbooks or manuals contain similar promises.⁷

The breach of an implied covenant of good faith and fair dealing is a third exception.⁸ A cause of action based on this theory often arises when

¹ Gilberg & Voluck, *Employee Termination Without Litigation*, PERSONNEL J. May 1987, at 17 [hereinafter Gilberg & Voluck].

² Genova, *A Delicate Balance*, THE BRIEF, Summer 1987, at 17 [hereinafter Genova].

³ Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975).

⁴ Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973).

⁵ Gilberg & Voluck, *supra* note 1, at 17.

⁶ Genova, *supra* note 2, at 20.

⁷ Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980); Kinoshita v. Canadian Pacific Airline, Ltd., 724 P.2d 110 (Haw. 1986); Cook v. Heck's, Inc., 342 S.E.2d 453 (W. Va. 1986).

⁸ Gilberg & Voluck, *supra* note 1, at 17; Genova, *supra* note 2, at 20.

an employee is discharged shortly before becoming entitled to some benefit or compensation. Examples include termination that denies an employee a substantial sales commission or the right to receive pension benefits.⁹

A fourth exception has been termed "managerial malpractice."¹⁰ Managerial malpractice may occur when an employer fails to provide accurate job evaluations that would put an employee on notice of poor work performance which might result in termination. Upon bringing a law suit, the employee will usually argue that he relied to his detriment on these satisfactory job evaluations.¹¹

The fifth and sixth exceptions to the employment-at-will doctrine adopted by various courts involve causes of action based on invasion of privacy and defamation.¹² Termination for invasion of privacy may occur in a number of situations ranging from discharge for matters involving an employee's personal life,¹³ to drug and chemical testing.¹⁴ Defamation suits generally arise when the employer's personnel department "criticizes" a discharged employee in a discussion with a prospective employer.¹⁵

III. PLANNING THE DEVELOPMENT OF EMPLOYMENT HANDBOOKS

A. *Avoiding the Development of Employment Handbooks That Will Be Viewed as Contracts by the Courts*

Many employers develop employment handbooks or manuals for their employees that set forth the employer's personnel policies. The policies often discussed in employment handbooks include grievance and termination procedures, severance pay, insurance, vacations and general operating rules.¹⁶

In the past, courts were reluctant to find a contractual obligation based upon an employer's personnel policy statements in a handbook.¹⁷ Most

⁹ Cleary v. American Airlines, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977).

¹⁰ Gilberg & Voluck, *supra*, note 1, at 17.

¹¹ Chamberlain v. Bissell, Inc., 547 F. Supp. 1067 (W.D. Mich. 1982); Flannigan v. Prudential Federal, 720 P.2d 257 (Mont. 1986).

¹² Gilberg & Voluck, *supra*, note 1, at 17; McCandless and Loftholm, *False and Defamatory*, THE BRIEF, Summer 1987, at 13 [hereinafter McCandless and Loftholm].

¹³ Marshall v. Brown, 141 Cal. App. 3d 408, 190 Cal. Rptr. 392 (1983).

¹⁴ Gilberg & Voluck, *supra*, note 1, at 17.

¹⁵ Davis v. Ross, 754 F.2d 80 (2d Cir. 1985).

¹⁶ Note, *Employee Handbooks and Employment at Will Contracts*, 1985 DUKE L. J. 196 (1985)[hereinafter Note, *Employee Handbooks*].

¹⁷ *Id.* at 200-02.

courts reasoned that statements contained in employment manuals are unilateral in nature, and therefore, subject to unilateral amendment.¹⁸ Courts also found statements in these handbooks unenforceable as promises in the absence of consideration.¹⁹ A third reason courts have traditionally refused to enforce statements contained in employee handbooks as contractual promises is the lack of "mutuality of obligations" because an employer or employee can terminate at any time for no reason.²⁰

However, the analysis of promises or statements contained in employment handbooks by courts under contract theories are undergoing a transition to a more liberal construction in favor of the employee.²¹ Some courts now look to whether a statement contained in a handbook has created a reasonable expectation of job security if the employee complies with the employer's stated policy.²² A court may now award monetary relief if an employer subsequently discharges an employee who has detrimentally relied on an employer's statement contained in a personnel handbook.²³

For example, in *Toussaint v. Blue Cross & Blue Shield*,²⁴ the Supreme Court of Michigan held that a jury verdict for an at-will employee was proper when the employee was discharged without just cause in violation of a company personnel manual provision that stated an employee would be terminated only for just cause and pursuant to certain procedures afforded to the employee.²⁵ In *Toussaint*, Blue Cross had developed a comprehensive two hundred and sixty page personnel manual.²⁶ The manual outlined a procedure for the fair, reasonable discipline of employees and provided that an employee could only be discharged for just cause.²⁷ Other courts likewise have adopted the "reasonable expectation" rule.²⁸

Furthermore, courts are also beginning to find that an employee's services are adequate consideration for finding a statement contained in a personnel manual to be a contract.²⁹ Recent decisions by courts have

¹⁸ *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 55, 551 P.2d 779, 782 (1976).

¹⁹ *Carter v. Hennessey*, 727 F.2d 1075 (11th Cir. 1984).

²⁰ *Sala & Ruthe Realty, Inc. v. Campbell*, 89 Nev. 483, 487, 515 P.2d 394, 396 (1973).

²¹ Note, *Employee Handbooks*, *supra* note 16, at 210-11.

²² *Id.*

²³ *Id.*

²⁴ 408 Mich. 579, 292 N.W.2d 880 (1980).

²⁵ Note, *Employee Handbooks*, *supra* note 16, at 210-11.

²⁶ *Toussaint*, 408 Mich. at 595, 597-98, 292 N.W.2d at 883-84.

²⁷ *Id.*

²⁸ *Brooks v. Trans World Airlines, Inc.*, 574 F. Supp. 805, 809 (D. Colo. 1983); *Arie v. Intertherm, Inc.*, 648 S.W.2d 142, 153-54 (Mo. App. 1983); *Wagner v. Sperry Univac, Div. of Sperry Rand Corp.*, 458 F. Supp. 505, 520-21 (E.D. Pa. 1978), *aff'd mem.*, 624 F.2d 1092 (3d Cir. 1980).

²⁹ *Leikvold v. Valley View Community Hosp.*, 141 Ariz. 544, 548, 688 P.2d 170, 173-74

begun to remove this stalwart defense from the arsenal of the employer's weapons.³⁰ This will make the proliferation of employee suits easier to bring.³¹

Employers must prepare personnel manuals with potential litigation in mind. For example, in *Edwards v. Citibank, N.A.*, the court held that an employee manual does not create an obligation on the part of an employer to continue the employment of an employee for life subject to the conditions set forth in the manual when the employee is permitted to terminate employment at any time and for no reason.³² An employer must develop a personnel manual that courts will not construe as an enforceable contract.³³

Two other strategies may be used by employers to avoid having an employment handbook viewed as a legally binding contract.³⁴ First, an employer may intentionally fail to make a personnel policy manual specific.³⁵ An employment manual should especially avoid mentioning a fixed term of employment.³⁶ Such items as specific duties, responsibilities, length of employment and an employee code of conduct should not all be included in an employee handbook.³⁷ If an employment manual is not comprehensive a court may conclude:

- (1) there was no intent by the employer to create contractual rights;
- (2) there was no bargain between the employer and employee;
- (3) no fixed term of employment existed.³⁸

This reasoning is exemplified in *White v. Chelsea Industries* where the court found that even though an employer had developed an employee handbook, the employment relationship was at-will when the term or duration of the employment was not specified.³⁹ If a personnel manual is not made specific, a court may find that lack of specificity to be critical to the employees contract claim.⁴⁰

(1984) (en banc); *Weiner v. McGraw Hill, Inc.*, 57 N.Y.2d 458, 460, 443 N.E.2d 441, 444-45 (1982).

³⁰ Note, *Employee Handbooks*, *supra* note 16, at 209.

³¹ *Id.*

³² 74 A.D.2d 553, 554, 425 N.Y.S.2d 327, 328-29 (1980).

³³ Note, *Employee Handbooks*, *supra* note 16, at 212.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *White v. Chelsea Indus.*, 425 So.2d 1090 (Ala. 1983).

³⁷ Note, *Employee Handbooks*, *supra* note 16, at 203-04.

³⁸ *Id.*

³⁹ 425 So.2d 1090-91 (Ala. 1983).

⁴⁰ *Heideck v. Kent Gen. Hosp. Inc.*, 446 A.2d 1095, 1096-97 (Del. Sup. Ct. 1982) (employee has no remedy when the employment manual is a unilateral statement of policies and no term of employment is set).

Second, company policies or the existence of a policy manual should not be publicized by the employer.⁴¹ Some courts will only find an enforceable contract based on an employment policy manual when it concludes that an "offer" has been made by an employer and there has been an "acceptance" of the manual's provisions by the employee.⁴² The court in *Southwest Gas Corp. v. Ahmad* held that a handbook must be more than a "current directory" of company policies in order to constitute an offer, and an employee can only accept such an offer by being aware of the handbook and complying with its provisions.⁴³

B. The Use of Contract Disclaimers in Employment Handbooks

Employers must plan for three different approaches courts use in determining whether statements contained in an employee handbook constitute an implied contract.⁴⁴ Some courts feel an employee handbook can be enforced as a unilateral contract.⁴⁵ Other courts have expressed the view that a manual promising "job security" or termination of employment only for "just cause" can be enforced as an unilateral contract.⁴⁶ A third view adopted by some courts is that employee handbooks are not contracts but only a guideline as to the employer's policy intentions.⁴⁷

Employers must develop a policy manual that avoids creating an environment of peace of mind among its employees.⁴⁸ If an employee is lulled into a false sense of security, an employee need not know of the policy's specifics or of a change in policy for a court to imply a contract.⁴⁹ In *Chin v. American Telephone & Telegraph Co.*, the court held that an employee's reliance on an employer's written code of conduct issued to all employees established an employment contract and the only grounds for dismissal.⁵⁰

⁴¹ Note, *Employee Handbooks*, *supra* note 16, at 214.

⁴² *Id.*

⁴³ 99 Nev. 594, 595-601, 668 P.2d 261, 262-65 (1983).

⁴⁴ Voluck & Hanlon, *Contract Disclaimers in Policy Documents*, PERSONNEL J., August 1987 at 123 [hereinafter Voluck & Hanlon].

⁴⁵ Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980).

⁴⁶ Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984); Woolley v. Hoffmann-La Roche, Inc., 99 N.J. 284, 491 A.2d 1257 (1985).

⁴⁷ Heideck v. Kent General Hosp. Inc., 446 A.2d 1095 (Del. Sup. Ct. 1982); Lieber v. Union Carbide Corp., 577 F. Supp. 562, 564 (E.D. Tenn. 1983).

⁴⁸ Voluck & Hanlon, *supra* note 44, at 123-24.

⁴⁹ Chamberlain v. Bissell, Inc., 547 F. Supp. 1067 (W.D. Mich. 1982).

⁵⁰ 96 Misc. 2d 1070, 410 N.Y.S. 2d 737 (Sup. Ct. 1978), *aff'd mem.*, 70 A.D.2d 791, 416 N.Y.S. 2d 160 (App. Div. 1979), *appeal denied*, 48 N.Y. 2d 603, 421 N.Y.S. 2d 1028, 396 N.E.2d 207 (1979).

Certain words included in an employment manual may be viewed as contract language.⁵¹ For example, defining and differentiating a probationary from a permanent employee can cause problems if the distinction is that a permanent employee's tenure is one without limit.⁵² But an employer can still safely plan and develop an employment handbook if he makes proper use of a disclaimer. Any disclaimer in an employment manual must be displayed in prominent language,⁵³ appearing in every part of the handbook that may become part of the employment relationship.⁵⁴ The employer must avoid listing specific grounds for discharge in the handbook.⁵⁵ Listing specific grounds for termination may negate a general disclaimer provision allowing an employer to dismiss an employee for any reason.⁵⁶

A disclaimer may contain language which allows for discharge without notice or liability on the employer's part⁵⁷ although those in managerial positions must be careful not to modify a disclaimer by making separate oral representations. In *Longley v. Blue Cross & Blue Shield of Michigan*, the court stated that an oral representation by a supervisor that discharge would only occur for just cause could modify the employment-at-will relationship.⁵⁸

Thus, in order to preserve an at-will relationship with its employees, employers should plan and develop employment manuals with five general principles in mind. In order for a disclaimer to be valid and enforceable it must:

- (1) contain language affirming the at-will status of the employee that is appropriate, clear, conspicuous and easily understood;
- (2) contain at-will language that appears in all appropriate parts of the manual that may become a part of the employment relationship;
- (3) provide the employer with unambiguous evidence that each employee has read and understands the disclaimers;
- (4) be in agreement with all subsequent communications with the employee whether oral or written; and
- (5) the proposed disclaimer language should be brief and clear.⁵⁹

⁵¹ Voluck & Hanlon, *supra* note 44, at 124.

⁵² Washington Welfare Assoc. Inc. v. Wheeler, 496 A.2d 613 (D.C. App. 1985).

⁵³ Woolley v. Hoffmann-La Roche, Inc., 99 N.J. 284, 421 A.2d 1257 (1985).

⁵⁴ Voluck & Hanlon, *supra* note 44, at 127-28.

⁵⁵ *Id.* at 125.

⁵⁶ Ferraro v. Koelsch, 124 Wis. 2d 154, 368 N.W.2d 666 (1985).

⁵⁷ Gianaculas v. TWA, Inc., 761 F.2d 1391 (9th Cir. 1985).

⁵⁸ 136 Mich. App. 336, 356 N.W.2d 20 (1984).

⁵⁹ *Id.* at 129-30.

The following language is an example of a disclaimer that dispels any contractual presumption:

I understand that this personnel policy manual and any other company documents are not contracts of employment and that any individual who is hired may voluntarily leave employment upon proper notice and may be terminated by the employer at any time for any reason. I understand that any oral or written statements to the contrary are hereby expressly disavowed and should not be relied upon by any prospective or existing employee.⁶⁰

IV. PLANNING JOB EVALUATIONS

A. *Standards for Evaluating an Employee's Job Performance*

The need for accurate evaluations of an employee's performance has never been greater. Frequently, the longevity of an employee in a position can best be explained by routine satisfactory job evaluations by a supervisor even though an employee's performance no longer merits such a rating.⁶¹ The longer an employee remains in a position and receives satisfactory evaluations, the more difficult it becomes to terminate the employee. Expectations of job security are often created by an employee's longevity and satisfactory job evaluation.⁶²

Preparing accurate job evaluations based upon ascertainable standards can prevent unnecessary litigation and put the employer in a stronger position if a claim arises. It is extremely important that a discharge for misconduct or poor work performance be fully documented. The employer should develop specific performance standards for every position in a written job description. It is important that uniform and fair application of the standards be applied to all employees in review of their performance. Any evaluation conducted by an employer must be based on ascertainable standards previously adopted.⁶³

Evaluations must be an honest review of an employee's performance. Specific problems and incidents should be detailed. Appropriate documents should note the employee's failure to meet a certain standard.⁶⁴ In *Chamberlain v. Bissell, Inc.*, an employer's failure to inform a twenty-three year employee of an impending discharge violated the duty of

⁶⁰ Gilberg & Voluck, *supra*, note 1, at 18.

⁶¹ *Chamberlain v. Bissell, Inc.*, 547 F. Supp. 1067 (W.D. Mich. 1982).

⁶² Heshhizer, *The New Common Law of Employment: Changes in the Concept of Employment at Will*, 36 LAB. L.J. 95, 106 (1985) [hereinafter Heshhizer].

⁶³ Goldman & Denis, *Avoiding and Defending Wrongful Discharge Claims*, THE BRIEF, Spring 1986, at 48 [hereinafter Goldman & Denis].

⁶⁴ *Id.*

ordinary care when the employer failed to give the employee an accurate performance appraisal.⁶⁵ However it should be noted that many courts still reject claims based on negligent evaluations, maintenance of records or supervision.⁶⁶

B. Notice and Warnings of Performance Deficiency

When an employee has failed to meet a required performance standard, notice of the deficiency should be given the employee. The employee should be given a copy of the evaluation and be required to sign it. Policies and rules of conduct should be established in developing a time frame for the correction of any deficiencies. Written progressive employee warnings should be issued as necessary.⁶⁷

Some employers have established what is known as a "work improvement plan." Under this arrangement, an employee is suspended for a day or two with pay. During this time, after counseling by the employer's personnel department, the employee is given time either to consider voluntarily terminating his employment or to continue working according to a clear, written statement of future performance goals.⁶⁸

Before any discipline is administered by the employer all relevant facts should be fairly and objectively determined. Any employee misconduct should be described in sufficient detail. The date, time and nature of an infraction should be detailed. Copies of warning letters should be included in the file as well as notations of the disciplinary measures invoked. Performance evaluations can be used as evidence of a pattern of an employee's misconduct justifying a discharge. Keeping accurate and detailed records will bolster the employer's chances of prevailing in a wrongful discharge action. Giving an employee a reasonable time to correct any performance deficiencies will also strengthen the employer's case.⁶⁹ Evaluations and other types of employee records should be filed and maintained as if one day they will be used in litigation.⁷⁰

⁶⁵ 547 F. Supp. 1067 (W.D. Mich. 1982).

⁶⁶ *Reid v. Sears Robuck & Co.*, 790 F.2d 453 (6th Cir. 1986); *Truex v. Garrett Freightlines, Inc.*, 784 F.2d 1347 (9th Cir. 1986); *Prost v. F.W. Woolworth Co.*, 647 F. Supp. 946 (D. Kan. 1986); *Ambro v. American National Bank and Trust Co. of Mich.*, 152 Mich. App. 613, 394 N.W.2d 46 (1986).

⁶⁷ *Goldman & Denis*, *supra* note 63, at 48.

⁶⁸ *Gilberg & Voluck*, *supra*, note 1, at 20.

⁶⁹ *Goldman & Denis*, *supra* note 63, at 50.

⁷⁰ *Id.*

V. PLANNING AND DEVELOPING A PERSONNEL POLICY

A. *The Personnel File*

A trend has developed under various state laws that now permits access to files by employees.⁷¹ Under no circumstances should private memoranda concerning any aspect of the employee's professional or personal life be included in a file.⁷² Nothing should be included in a personnel file that an employer wouldn't want an employee to see.

However, every personnel file should contain certain documentation including counseling notes, performance evaluations and disciplinary action taken against the employee. Personnel employees and management should immediately document any performance or disciplinary problem. The personnel file should indicate that the employee was given time to correct any performance deficiency problem.⁷³ If the following measures are implemented it will be much easier for the employer to defend against a wrongful discharge claim.

B. *Developing and Reviewing Personnel Policies*

All written company policies and personnel forms should be periodically reviewed to ensure compliance with the law. As discussed earlier, language implying long-term employment may be deleted. The employer should use express disclaimers not only in a personnel handbook but in other documents as well.⁷⁴ Disclaimers can appear on all employment applications, and letters offering or granting employment,⁷⁵ and all employment rules.

In reviewing, revising and developing personnel documents and policies, an employer should: (1) eliminate language that might be interpreted as allowing a discharge only for "just cause" and warn supervisors about making oral assertions of "job security"; (2) include clear and prominent disclaimer language in all personnel documents; (3) establish an internal grievance procedure for employees to challenge the disciplinary action of the employer; (4) conduct discharges in a noninflammatory manner; (5) allow a neutral office in the personnel department to handle the dismissal interview; (6) conduct the dismissal interview as pleasantly and privately as possible and tell the employee the actual reason for discharge; (7) allow the employee to tell his side of the story and take notes before making a final decision on discharge; (8) establish a policy

⁷¹ PA. STAT. ANN. tit. 43, § 1321 (Purdon 1987).

⁷² Goldman & Denis, *supra* note 63, at 50.

⁷³ *Id.*

⁷⁴ *Id.* at 50-51.

⁷⁵ Voluck & Hanlon, *supra* note 14, at 129; Gianaculas v. TWA, Inc., 761 F.2d 1391 (9th Cir. 1985).

that does not permit a supervisor to discharge an employee without getting clearance from a higher level of management that understands the legal consequences of a discharge; (9) conduct a detailed review of all relevant facts including the consistency of treatment and handling of all comparable cases before terminating an employee; and (10) consider having the employee sign a consent form to release the employer from any further financial and legal obligations by offering extra benefits such as severance pay.⁷⁶

C. Training Personnel Employees

An employer may develop a legally sound employment handbook and revise all other employment documents according to the guidelines previously discussed, yet still face a successful wrongful discharge claim. Usually problems arise when employees in the personnel department are not adequately trained in the interviewing, hiring, and termination processes. Many wrongful discharge suits can be totally avoided if personnel employees handle the discharge in a professional manner and know how to deal correctly with inquiries from the discharged employee's prospective future employers.

Oral statements or promises concerning the duration of employment made by supervisors, personnel officers or other in managerial positions during the interviewing and hiring process should be avoided.⁷⁷ Problems in this area can be headed off by providing periodic training for interviewers and supervisors. Interviewers and supervisors should be given a warning of the dangers involved in making promises to prospective or present employees.⁷⁸

Supervisory and personnel employees should be instructed in writing that they have no authority to make statements on the duration of the employment relationship. They should be further advised to avoid making contrary statements.⁷⁹ Oral representations modifying the employment-at-will status could very well be found to be enforceable by a court.⁸⁰ It is imperative that managers and supervisors be cautioned not to make promises that might negate the at-will relationship.

Another area of concern is the handling of job evaluations and warnings regarding improper conduct and poor work performance. The number of personnel handling these matters should be limited. Collection and retention of such information should be kept as limited and confidential as possible. Evaluations or disciplinary communications should

⁷⁶ Gilberg & Voluck, *supra* note 1, at 18-20.

⁷⁷ Longley v. Blue Cross & Blue Shield of Michigan, 136 Mich. App. 336, 356 N.W.2d 20 (1984).

⁷⁸ Goldman & Denis, *supra* note 63, at 51.

⁷⁹ *Id.*

⁸⁰ Longley, 136 Mich. App. at 336, 356 N.W.2d at 21.

be researched to make sure all facts are supported by adequate information.

It is also important that personnel department employees be trained in how to deal with inquiries by a former employee's prospective employer. An employer, through the personnel department, should adopt what is termed a "neutral reference" policy. This policy requires that supervisors and personnel employees be cautioned against releasing any information on a former employee to his prospective employer, other than the employee's name, dates of employment, positions held and salary.⁸¹

A specific employee should be responsible for handling inquiries from a discharged employee's prospective employer. Additional information should only be released upon obtaining the former employee's written permission to release the information to the specific employer making the inquiry. A former employee may be required to sign an additional release from all claims in consideration for the employer's consent to release more information.⁸²

An employer should be aware that for many decades courts have recognized a cause of action for interference with a discharged employee's right to obtain other employment.⁸³ For example, in *Smith v. Klein*, an Ohio appellate court held that a cause of action is cognizable for interference with an employment relationship even absent a contract.⁸⁴ Therefore, employers should not release unnecessary information to a discharged employee's prospective employer. Strongly worded criticism, although only slightly inaccurate, may be considered "blacklisting" the former employee and be a basis for a defamation suit.⁸⁵

Further, no emotional or personal comments should be made orally or in writing to the employee.⁸⁶ Conclusory language and veiled references to criminal⁸⁷ or immoral activity⁸⁸ should be avoided.

A wide variety of circumstances can give rise to a defamation cause of action. For example, in *Davis v. Ross*,⁸⁹ singer Diana Ross circulated a "reference" letter listing seven former employees she had discharged because of unacceptable work or personal habits. The court rejected Ross' argument that the letter merely stated an opinion and was not libelous.

⁸¹ McCandless & Loftholm, *supra* note 12, at 13, 40.

⁸² *Id.* at 40.

⁸³ *Commonwealth v. Reinecke Coal Mine Co.*, 117 Ky. 885, 79 S.W. 287 (1903); *Johnson v. Oregon Stevedoring Co.*, 128 Or. 121, 270 P. 772 (1928).

⁸⁴ 23 Ohio App. 3d 146, 492 N.E.2d 852 (1985).

⁸⁵ McCandless & Loftholm, *supra* note 12, at 40-41.

⁸⁶ *Id.*

⁸⁷ *Loughry v. Lincoln First Bank, N.A.*, 67 N.Y. 2d 369, 494 N.E.2d 70, 502 N.Y.S.2d 965 (1986).

⁸⁸ McCandless & Loftholm, *supra* note 12, at 40-41.

⁸⁹ *Davis v. Ross*, 754 F.2d 80 (2d Cir. 1985).

The court held a jury issue existed as to whether the letter was defamatory.

Intra-company communications may also lead to a defamation action.⁹⁰ Defamation actions against employers have been brought by former employees based on performance evaluations,⁹¹ internal company and office meetings,⁹² warning letters,⁹³ explanations to co-workers of an employee's discharge,⁹⁴ and the dictation of a discharge letter to a secretary.⁹⁵ The Minnesota Supreme Court went so far as to hold in *Lewis v. Equitable Life Assurance Society of the United States* that an employer's communication to an employee stating the reasons for discharge constituted a defamatory publication when repeated to a discharged employee's prospective employer by the former employee.⁹⁶ The court found the repetition by the employee "compelled self-publication" that was foreseeable by the employer.⁹⁷

A trend has developed in the courts to award punitive damages for spreading false rumors about an employee or inducing an employee to terminate employment by fraud, oppression or malice.⁹⁸ In *Loughry v. Lincoln First Bank*, the court noted that punitive damages could be properly awarded against an employer if management authorizes, participates or consents to outrageous conduct that leads to termination of employment.⁹⁹ If high ranking officers of a company authorized, ratified or consented to the spreading of a false rumor that an employee had misappropriated property of the employer punitive damages could be awarded.¹⁰⁰ The *Loughry* court did not find such employer conduct.¹⁰¹

Meetings discussing evaluations and warnings should be limited to as few persons as possible. No unauthorized visitors should be allowed to attend a meeting where an employee's behavior is discussed. Reasons for the termination of an employee should never be announced. If the employment relationship is based on a contract, an arbitration clause may be made a part of the contract. In case of an arbitration clause,

⁹⁰ McCandless & Loftholm, *supra* note 12, at 14.

⁹¹ McCone v. New England Tel. and Telegraph Co., 393 Mass. 231, 471 N.E.2d 47 (1984).

⁹² Finney v. State, 672 S.W.2d 559 (Tex. App. 1984); Banas v. Matthews Int'l Corp., 348 Pa. Super. 464, 502 A.2d 637 (1985); Benassi v. Georgia Pacific, 63 Or. App. 672, 662 P.2d 760 (1983).

⁹³ Agriss v. Roadway Express, Inc., 334 Pa. Super. 295, 483 A.2d 456 (1984).

⁹⁴ Jones v. J.C. Penney Co., Inc., 164 Ga. App. 432, 297 S.E.2d 339 (1982).

⁹⁵ Annotation, *Libel and Slander: Dictation to Defendants' Secretary, Typist, or Stenographer as Publication*, 62 A.L.R. 3d 1207 (1975).

⁹⁶ 389 N.W.2d 876 (Minn. 1986).

⁹⁷ *Id.*

⁹⁸ Mallor, *Punitive Damages for Wrongful Discharge of At Will Employees*, 26 Wm. & Mary L. Rev. 449, 484, 494 (1985)[hereinafter Mallor].

⁹⁹ 67 N.Y.2d 369, 502 N.Y.S.2d 965, 494 N.E.2d 70 (1986).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

mandatory arbitration with agreed upon rules should be outlined in the contract. This will not only reduce litigation costs and damages but also increase the likelihood of settlement in case a claim is brought.¹⁰²

An employer should consider adopting the following guidelines before terminating or accepting the resignation of an employee: (1) establish a "work improvement plan" (discussed earlier); (2) institute binding outside arbitration with guidelines on the composition of the panel, the scope of issues to be presented, limits on damages and the waiver of rights to a future suit; (3) conduct exit interviews with departing employees and have them fill out appropriate forms to determine why the employee is voluntarily leaving; and (4) establish a post-employment placement program for discharged employees.¹⁰³

Adopting these guidelines lessens the likelihood of a successful wrongful discharge claim. Establishing an outplacement service can be especially helpful in reducing the likelihood of suit.¹⁰⁴ The employer should do whatever is possible to soothe any bitter feelings a discharged employee might harbor, even to the extent of helping the discharged employee secure another job if possible.

D. Reviewing Insurance Coverage for Wrongful Discharge Claims

An employer's general insurance liability policies often cover defamation claims involving libel and slander. The employer should be certain that the policy covers both intentional and unintentional defamation torts thereby covering an award of punitive damages. A determination should be made as to whether emotional and mental distress resulting from defamation is covered by the insurance carrier.¹⁰⁵ Additionally, the employer should check with his workmen's compensation carrier.

VI. PLANNING FOR THE SETTLEMENT OF EMPLOYMENT DISCHARGE CLAIMS

It is impossible to develop a personnel policy that is one hundred percent foolproof against litigation. Mistakes will be made and employment discharge claims will be filed by disgruntled employees. Employers must plan for the settlement of claims arising out of litigation by developing strategies to limit liability, and more importantly, to limit the number of claims filed.

Litigation may be settled by reinstating a discharge employee. Reinstatement should be considered if rehiring a discharged employee will not disrupt the employer's operations. Offering reinstatement has two advan-

¹⁰² McCandless & Loftholm, *supra* note 12, at 41.

¹⁰³ Gilberg & Voluck, *supra*, note 1, at 17.

¹⁰⁴ McCandless & Loftholm, *supra* note 12, at 41.

¹⁰⁵ *Id.*

tages. It will cut off and limit the accrual of backpay damages. If an employee refuses reinstatement, the employer may limit his liability by arguing that the employee has failed to mitigate damages.¹⁰⁶

If a monetary settlement is reached, the employer should ask for and receive a release by the employee of all causes of action referred to in the employee's complaint. The employer should also obtain a release of all statutory claims. The agreement should define the rights and duties of the settling parties and contain a non-admission and non-disclosure clause which will prevent the settlement terms from being disclosed. The employer will likewise not be admitting any wrongdoing. Any settlement or payment should be conditioned on dismissal of the suit.¹⁰⁷

VII. CONCLUSION

Employers must plan now for the recent development of exceptions to the employment-at-will doctrine. Employers should review all policies of its personnel department and make appropriate changes. Forecasting future developments in employment law, or for that matter, any other legal developments is an inexact science. However, by keeping informed of trends in this area, an employer can plan for the future. The best time to deal with changes in the employer-employee relationship is before problems arise. Once a wrongful discharge suit has been filed, it is often too late. Planning ahead will prevent headaches in the future and will permit the employer to spend time pursuing more profitable activities.

ROBERT J. CHURILLA

¹⁰⁶ Goldman & Denis, *supra* note 63, at 53.

¹⁰⁷ *Id.* at 54.

